MOTION FILED
DEC 13 1983

No. 83-623

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

FRANK B. JAMES, et al.

Petitioners

v.

JAMES G. WATT, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION AND BRIEF ON BEHALF OF AMICI CURIAE CENTER FOR CONSTITUTIONAL RIGHTS, INDIAN LAW RESOURCE CENTER, MOHAWK NATION, NATIONAL LAWYERS GUILD, ONONDAGA NATION, UNITED AMERICAN INDIANS OF NEW ENGLAND IN SUPPORT OF GRANTING THE WRIT

Morton Stavis
Counsel of Record
Center for Constitutional Rights
853 Broadway
New York, NY 10003
212/674-3303

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MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIE

The Center for Constitutional Rights and other amici hereby respectfully move, pursuant to Rules 36.1 and 42(3) of the Court's Rules of Practice, for leave to file the attached brief as amici curiae in support of petitioner's effort to obtain review of important procedural and

substantive questions concerning the extent to which the Constitution and federal common law protect Indian land title.

This motion and the attached brief are timely filed within the time allowed for filing of respondents' brief on the petition for certiorari.

Amici curiae are Indian nations, Indian rights and civil liberties organizations, which have been involved in issues of the type presented in this case or which believe that denial of due process and Constitutional protection to Indians ultimately affects the rights of all people in the United States and that equitable application of the law is essential to protecting the rights of all people.

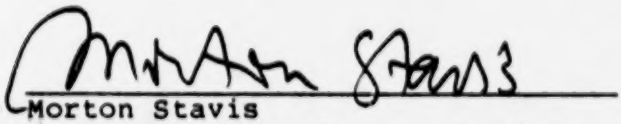
The proposed brief of amici addresses the need for granting the writ from a

broad perspective, beyond that presented by the parties. The proposed brief discusses the national significance of the issues presented and the need for this Court to affirm basic protections historically guaranteed to Indians by the Constitution and federal common law.

Amici believe that the courts below have ruled against petitioners on the basis of ungrounded and inconsistent standards that are wholly and grossly outside the framework fashioned by this Court for litigating Indian land title. Amici believe that the erroneous judgments below should be reversed, to protect Indian land title throughout the country.

Amici have requested the consent of the parties to appear. The petitioners and respondent Commonwealth of Massachusetts have granted such consent,

but to date other respondents have not. For the foregoing reasons, amici respectfully move this Court for leave to file the attached brief amici curiae in sup-



Morton Stavis
Center for Constitutional Rights
853 Broadway
New York, NY 10003
212/674-3303
Counsel of Record for Amici

Center for Constitutional Rights

Indian Law Resource Center

Mohawk Nation

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Morton Stavis
Counsel of Record
Center for Constitutional Rights
853 Broadway
New York, NY 10003
212/674-3303

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STATEMENTS OF INTEREST OF AMICI CURIAE

Center for Constitutional Rights

The Center for Constitutional Rights was born out of the southern civil rights movement of the 1960's. Since that time it has developed legal theories in support of constitutional rights in many areas. In June, 1962, CCR joined as amicus curiae in Hopi Indian Tribe v. Block to support religious rights in the San Francisco Peaks. Other cases have included the Wounded Knee defendants and Leonard Peltier, South Dakota v. Means, and other lawsuits.

Indian Law Resource Center

The Indian Law Resource Center assists Native Americans in protecting their legal rights, human rights, cultures and religions through a program of research, public education and legal assistance.

Mohawk and Onondaga Nations

The Mohawk and Onondaga Nations, located within the State of New York, are recognized nations of Indians who believe their interests in their land are adversely affected by the decision of the First Circuit Court of Appeals in this case, and who wish to appear as amici in support of granting the petition for certiorari.

National Lawyers Guild

The National Lawyers Guild is a nationwide membership organization of 7,000 lawyers, legal workers, law students and jailhouse lawyers with 105 chapters throughout the United States. Since its founding in 1937, the Lawyers Guild has been dedicated to seeking social equality, freedom to dissent and human rights. The Guild has regularly appeared as amicus curiae in defense of

civil liberties and treaty rights of Native people. It is in that context that the Guild supports petitioners in this case.

United American Indians of New England

United American Indians of New England is a regional organization formed to promote traditional native cultures and to support Native American concerns among the public. In this context, UAINE seeks acknowledgement and protection of Indian lands.

INTRODUCTION: REVIEW OF LOWER COURT DECISION IS APPROPRIATE AND NECESSARY DESPITE EXISTENCE OF COMPETING LAWSUITS

Amici take no position regarding the existence of competing lawsuits regarding land title within the Gay Head tribe, except to assert that such competition is in itself not a proper basis upon which to premise the grant or denial of review of an erroneous lower court decision, especially where such decision may affect the rights of Indian nations not party to this litigation.

Amici seek leave to appear at this stage of the proceedings in this case because we believe that the decision below presents a threat to Indian land title throughout the nation, and that a dangerous precedent will have been set if the decision below is not reversed.

Amici believe that protection of Indian land title is integral to a

longstanding national policy that recognizes the unique status of the indigenous population of this continent. Amici believe that protection of Indian title is inextricably bound together with a continuing federal obligation to protect Indian cultures, institutions, and ways of life, expressed in a multitude of statutes and decisions.

Doctrines of standing and "balancing of interests" have been inappropriately applied by the lower courts to deprive Indian petitioners of their right to present federal common law and Constitutional claims whose significance has long been recognized by this Court.

STATEMENT OF THE CASE

Petitioners have existed on land they now inhabit and claim since time immemorial, and certainly since the time of first European contact with this con-

tinent.

Petitioners' attempt to litigate federal common law and Constitutional claims to their land was dismissed for lack of standing, and their move to cure the standing problem by amendment of their complaint was denied. Frank B. James, et al. v. James G. Watt, et al., D.C. Mass., Civ. No. 81-3204 (1982).

The First Circuit affirmed dismissal of Petitioners' complaint, holding that unilateral state action extinguishing Indian land title is to be tested for its legality by a simple "balancing of interests" approach. Frank B. James, et al. v. James G. Watt, et al., 716 F.2d 71 (1983).

ARGUMENT

I. THE DECISION BELOW CREATES A TOTALLY INAPPROPRIATE AND FUNDAMENTALLY INCORRECT STANDARD TO PERMIT THE EXTINGUISHMENT OF INDIAN TITLE BY UNILATERAL STATE ACTION

The First Circuit's decision which upholds extinguishment of Indian land title by unilateral state action applies reasoning wholly inappropriate for the subject matter and never applied before in any federal court. The use of a "balancing of interests" test which federal courts have fashioned in determining whether or not a state can exercise jurisdiction on Indian lands has never before been applied to the issue of federal protection of Indian land titles. It is totally an inappropriate use of the test and there is absolutely no authority for its use. Were such a decision to stand, chaos in the law of Indian jurisprudence would result.

Petitioners federal Constitutional and common law claims to Indian title were denied by the District Court without reference to opinions of this court

requiring a contrary result. Regarding the central issue of federal power over Indian lands derived from the Indian Commerce Clause, the District Court's entire reasoning, without citation of any authority, was: "The Commerce Clause, U.S. Const. art. I, sec. 8, cl. 3, standing alone does not provide a cause of action such as plaintiffs assert here."

The First Circuit decision affirming the District Court's dismissal is based on a cursory review of academic treatises, on an unjustified importation of Interstate Commerce Clause principles, and on an extended hypothetical discussion purporting to apply an "interest balancing" test to Indian land title. Nowhere in any of the authorities cited by the Circuit Court is there presented any suggestion that the federal protec-

tion of Indian title to land from state interference is subject to an "interest balancing" approach. None of the cases cited by the First Circuit in support of its opinion go to the central issue of Indian title to land.

The Circuit Court's hypothetical reasoning purporting to "balance interests" regarding Indian land title begins with an assumption that is wholly out of line with controlling authority:

> . . . imagine the circumstances in which plaintiffs' preemption argument would be strongest--namely if Congress had never enacted the (Indian Nonintercourse Act). 716 F.2d at 74.

This Court has clearly and unambiguously stated, in Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 669 (1974) that:

> . . . a tribal right of occupancy, to be protected, need not be "based upon a treaty, statute, or other formal government action." (quoting United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941))

In light of this principle, the existence of the Nonintercourse Act is irrelevant to a claim of Indian title under federal Constitutional and common law.[1] The incongruity of the First Circuit's reasoning is further demonstrated when it cites the 1834 Nonintercourse Act for the proposition that the settled policy enunciated in this Court's 1916 decision, United States v. Nice, 241 U.S. 591, was "modified . . . (by) Congress consciously"! 716 F.2d at .

This Court has never departed from its original assertion of federal preemption over the question of Indian title to

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[1] It is surely significant in this regard that the earliest formulation of federal protection of Indian title, Johnson v. M'Intosh, 8 Wheat. 543 (1823), Worcester v. Georgia, 6 Pet. 515 (1832), were decided well after passage of the first Nonintercourse Act and yet did not rely in the least on the Act as a source of preeminent federal power, regarding them rather as expressions of this power.

land enunciated by Chief Justice Marshall. The reaffirmation of that basic doctrine in Oneida, supra, is tossed aside by the First Circuit as "dicta in later cases." 716 F.2d at 73. In fact, this Court is and always has been explicit about Indian title as a federal matter:

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the orginal States . . . but this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law. 414 U.S. at 670.
>
> * * *
>
> "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." Cramer v. United States, 261 U.S. 219, 227. This policy was first recognized in Johnson v. M'Intosh, 8 Wheat. 543, and has been repeatedly reaffirmed. (citations omitted) Id., at 668

(quoting United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 345 (1941)).

The First Circuit's failure and refusal to acknowledge this "rudimentary proposition" that Indian title is a matter of federal law and can be extinguished only with federal consent is an astounding and blatant disregard of controlling authority unprecedented in the history of federal Indian law.[2] The First Circuit refers to these basic and controlling principles of federal preemption in matters of Indian title as mere "arguments" which "one could note" in a hypothetical discussion which it

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[2] Except for Andrew Jackson's infamous remark regarding this Court's decision in Worcester v. Georgia, supra, that "John Marshall has made his decision, now let him enforce it!" Horace Greeley, The American Conflict, Vol. I, p. 106 (1864).

concludes by saying it cannot "pretend to know who would have won this hypothetical argument." 716 F.2d at 75. The Circuit Court gives no justification for this disregard of Oneida less than ten years after the decision, other than by citation of an academic article "exploring difficulties of interpreting congressional failure to legislate." Id., at 74.

This Court should not permit such flagrant and flippant departures from established standards.

II. THE DECISION BELOW IS IN CONFLICT WITH RECENT DECISIONS IN THE FOURTH AND SECOND CIRCUITS

The First Circuit decision in this case is completely contrary to recent decisions in the Fourth and Second Circuits, Catawba Indian Tribe of South Carolina v. State of South Carolina, Docket No. 82-1671 (4th Cir., October 11,

1983), and Oneida Indian Nation of New York v. County of Oneida, Docket No's. 82-7436, 82-7486, 82-7526 (2d Cir., September 29, 1983). A review of Catawba and Oneida underscores the absurdity of the First Circuit's reasoning.

In Catawba, the Fourth Circuit reversed a District Court decision which had granted the state's motion for summary judgment (unreported decision, D.C. S.C., Columbia Div., Civ. No. 80-2050, June 14, 1982). The Circuit Court held that the Catawba Termination Act, 25 U.S.C. §§931, et seq. (1959), did not preclude plaintiff's suit to recover lands under the Nonintercourse Act. The court stated that the termination act had no effect on plaintiff's land claims, neither extinguishing nor preserving them. The Fourth Circuit specifically held that the termination act did not

make state law applicable to the tribe, nor did it end tribal existence.

Catawba acknowledges that Indian land rights are so fundamentally important in our federal scheme that they can be terminated only by explicit Congressional intention, which was not present in the 1959 act.

The recent Second Circuit decision of Oneida Indian Nation of New York State, et al., v. The County of Oneida, New York, et al., also recognizes that federal common law protects Indian title. Holding that the Nonintercourse Act merely augmented already existing federal common law, the court affirmed the District Court's finding of a private right of action to enforce the Act. In upholding this right, the Second Circuit stated:

> There is no evidence to suggest that Congress intended to deny common

> law remedies to the Indians. In an analogous area involving congressional extinguishinment of Indian land titles, the Supreme Court has stated that evidence of such congressional intent should be "plain and unambiguous," and would 'not be lightly implied in view of the avowed solicitude of the Federal Government for the Welfare of its Indian wards.' U.S. v. Santa Fe Pacific, 314 U.S. at 346, 354. Neither should we imply a congressional intention to extinguish the Indians' common law remedy for vindicating their property rights in the absence of plain and unambiguous evidence of such a desire. Accordingly, we hold that the district court had jurisdiction to grant relief under federal common law. Id., Slip Opinion, page 11.

Upon comparison of these two decisions from other circuits with the First Circuit decision in the instant case, the inequities become all too apparent. In Catawba and Oneida settled law is closely followed, whereas in James v. Watt, the heretofore acknowledged rudimentary propositions are completely ignored in order to deny the Indian litigants the opportunity to fully litigate their claims.

This Court must resolve this conflict between Circuits in favor of the long-standing policy of solicitude toward Indian litigants.

III. PETITIONER'S CONSTITUTIONAL AND FEDERAL COMMON LAW CLAIMS PRESENT QUESTIONS OF RECOGNIZED SIGNIFICANCE TO THIS COURT

Petitioners present the most fundamental approach to matters of Indian land title since the great Cherokee Nation appeals to this Court 150 years ago. Petitioners' claims antedate the Revolution and the Constitution. They go to the heart of federal jurisdiction over Indian land cases, rooted in basic principles of international law and sovereignty. As the United States Department of Justice stated in its amicus brief to this court in State of Connecticut v. Mohegan Tribe, 638 F.2d 612 (2d Cir., 1980), cert. denied. 452 U.S. 968 (1981):

> . . . quite independently of any statutory restraints, Indian tribes have long been held disabled from alienating their lands without the concurrence of the national sovereign, and any such attempted transaction is void as a matter of law, without reference to the Nonintercourse Acts. Thus, in this case, the respondent pleaded the ineffectiveness of any land sales under the Constitution, and no decision here of the statutory issue can affect that fundamental objection, not yet addressed by the courts below. Id., at 4-5.

This Court has repeatedly applied these principles, most recently in Oneida Indian Nation of New York v. County of Oneida, 414 U.S. 661 (1974), wherein was stated:

> The rudimentary propositions that Indian title is a matter of extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States . . . but this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law. Id., at 670.

* * *

> "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." Cramer v. United States, 261 U.S. 219, 227. This policy was first recognized in Johnson v. M'Intosh, 8 Wheat. 543, and has been repeatedly reaffirmed. (citations omitted) Id., at 668 (quoting United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 345 (1941)).

In light of these oft-repeated principles, the summary disposition by the District Court of Petitioners' claim under the Indian Commerce Clause ("The Commerce Clause . . . is simply the basis for the Nonintercourse Act, under which these individual plaintiffs cannot state a claim.") lacks any justifiable foundation, and the First Circuit's affirmance of this disposition, relying on an academic treatise and hypothetical analogies, is grossly out of line with this Court's holdings.

The line of reasoning introduced

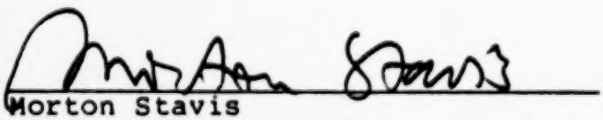
through the First Circuit's hypothetical discussions and speculations concerning the purpose of Massachusetts statutes extinguishing Indian title, and purporting to "balance" this purpose with other factors is patently contradictory to basic federal Indian law. The Circuit Court's assertion of a "valid (state) interest in maintaining the stability of land transactions entered into according to its laws, in treating all of its citizens equally, and providing the same property rights to all of its citizens," 716 F.2d at 76, flies in the face of the entire purpose of the federal restriction on alienation of Indian land. The "legal disability" inherent in the concept of "Indian wardship" is designed precisely to prevent this land from being conveyed, to keep Indian land from being available for fee simple conveyance as ordinary

real estate. This Court long ago recognized the fraud, overreaching, and speculation that has historically occurred in relation to the sale and purchase of Indian land. "Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." United States v. Kagama, 118 U.S. 375, 384 (1886).

CONCLUSION

The First Circuit opinion affirming dismissal of Petitioners' claims to Indian title in land at Gay Head is so dangerously and grotesquely out of line with settled law that this Court must grant the writ of certiorari to review and reverse it. Should the writ not be granted, and the opinion stand, the result would be a serious confusion and erosion of long-standing and recently

reaffirmed principles of federal preeminence in matters of Indian land title. Indian land throughout the country would be exposed to attack on the basis of a new standard totally inappropriate and fundamentally incorrect.



Morton Stavis
Center for Constitutional Rights
New York, NY

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